

1 discrimination statute as to whether or not
2 NFL has been impaired in its ability to
3 compete.

4 JUDGE SIPPEL: What page are you
5 on?

6 MR. BURKE: This is 391, Your
7 Honor.

8 BY MR. BURKE:

9 Q So you would agree that Comcast
10 lacks the ability to foreclose the NFL Network
11 under the theory that you advanced in this
12 article?

13 A No, I wouldn't agree to that.
14 What I would say is that if this case were an
15 antitrust case, and we were proceeding in an
16 antitrust court, then the foreclosure share
17 would be more important, and this is the most
18 important thing, that the effect on consumers
19 and - would be elevated.

20 Q So you have done no - have you
21 made any efforts to determine the so-called
22 foreclosure share that you just referenced?

1 A Yes, I have.

2 Q And what is that?

3 A Well, it's the maximum number of
4 homes that Comcast can shut NFL down from.

5 Q And that is about [REDACTED]
6 homes?

7 A It's the largest NVPD in the
8 country, yes.

9 Q But there are how many other homes
10 left after you take out the Comcast? [REDACTED]
11 [REDACTED] or more, right?

12 A Right.

13 Q So how can Comcast unfairly
14 prevent the NFL Network from selling its
15 products when [REDACTED] of the market is wide
16 open to the NFL Network?

17 A So - and I'll grant you this, in
18 an antitrust case we are right at the edge of
19 what Professor Hovencamp, who writes the
20 antitrust treatise, would say is the
21 threshold. The threshold is about 20
22 foreclosure share. And so Hovencamp would say

1 that that is sufficiently large, to make the
2 presumption of anticompetitive impact that has
3 harmed consumers, absent any strong showing of
4 efficiencies.

5 But I grant you, just want to be
6 completely up front, the 23 percent is close
7 to the threshold that I understand is
8 governing in the antitrust case law, but has
9 no import here.

10 Q Again, Dr. Singer, are you giving
11 us legal advice as to what the standard of
12 review is here?

13 A I'm just trying to help you out.

14 Q You told us a little while ago
15 that the theory that you are relying upon
16 relates to antitrust theory. Didn't you do
17 that just five minutes ago?

18 A No. Let me just make sure that we
19 are on the same page here. When an economist
20 develops theoretical models - when an
21 economist develops theoretical models of
22 vertical foreclosure, they do not write

1 separate models for a regulation case as they
2 do for a an antitrust case. They have to go
3 with models that are out there, and these
4 models were largely developed for antitrust
5 cases.

6 Q I guess I'm asking you to testify
7 as an economist about if you want to determine
8 whether there is an adverse effect on
9 competition or consumers, you have to look to
10 the foreclosure share, don't you?

11 A On consumers, yes, you would.

12 Q And you referenced Professor
13 Hovencamp's 20 percent tests; remember that?

14 A That is one test that is out
15 there.

16 Q Wasn't there another element of
17 Professor Hovencamp's test that the market had
18 to be highly concentrated with an HHI over
19 1,800?

20 A Well, that's not the second
21 element. It might be in Hovencamp's, but what
22 the economist is looking for is a combination

1 of two things. For an antitrust case -

2 Q Please answer about Professor

3 Hovencamp's test. You don't know the answer?

4 A I don't know the answer.

5 Q That's fine. Did you do any

6 empirical analysis of whether advertising

7 prices have risen as a consequence of Comcast

8 decision to tier the NFL Network?

9 A I looked at advertising rates, but

10 the problem is that I have about five

11 datapoints in time, which is what Golf is

12 charging and Versus is charging in 2000, 2001,

13 2002, 2005, and I just don't think that with

14 that database I have enough information to

15 project a but-for series of advertising rates

16 for Golf.

17 What I can confidently infer based

18 on the large economies of share here, and the

19 large foreclosure share is that a pricing

20 constraint otherwise imposed by the NFL on

21 those advertising rates has been impaired; has

22 been weakened.

1 Q But do you know the extent of that
2 constraint at all?

3 A No, I did not - let me be
4 absolutely open, I did not conduct a damages
5 analysis here. That is, I did not calculate
6 what the but-for price for Golf's advertising
7 rate was.

8 Q But you didn't even conduct an
9 analysis of actual impact. There is no
10 empirical evidence that you found that shows
11 that advertising prices are higher as a
12 consequence of Comcast's decision to tier the
13 NFL?

14 A I'll grant you I don't have direct
15 evidence that advertising prices are inflated.
16 However, I have satisfied empirically the
17 necessary conditions of economic models of
18 vertical foreclosure to make an inference that
19 prices were higher.

20 Q So what you have done basically
21 is, you've got an academic model, and you say
22 that the conditions of that model are

1 fulfilled, and therefore you are going to
2 presume that there is an impact on price
3 without any evidence of actual impact on
4 price?

5 A Well, I'm going to presume it
6 until I see offsetting efficiencies, and that
7 is just following in the tradition of economic
8 scholarship.

9 Q And I guess you haven't done any
10 analysis, empirical analysis, of whether the
11 affiliation fees of the Golf channel or Versus
12 have been inflated as a consequence of the
13 decision to tier the NFL Network?

14 A I grant you I don't have direct
15 evidence of a comparison with benchmarks with
16 Golf and the Versus what license fees should
17 have been. What I have is this inference that
18 comes from the satisfaction -

19 MR. SCHMIDT: Your Honor, on this
20 point I'd like to simply note for the record,
21 because I think some of these questions are a
22 little unfair, we produced these documents

1 very late. The reason we are producing these
2 documents very late was because literally
3 counsel for Comcast did not ask permission to
4 produce these documents to us. These are
5 their documents, their agreements with third
6 parties. They didn't ask permission to
7 produce these documents to us until after the
8 discovery cutoff had past, in at least one
9 instance we know about.

10 So some of these documents came in
11 before Dr. Singer did his final report, the
12 day before; I think some might have come in
13 after.

14 I just want that clear for the
15 record, because I think there is a certain
16 unfairness in asking questions on documents
17 that came in after he generated his testimony.

18 MR. CARROLL: Your Honor, I don't
19 want to belabor this, but I can't just leave
20 that unresponded to in the record. We got
21 information yesterday for the first time about
22 a DIRECTV contract that we didn't have. We

1 got a new analysis for this witness yesterday
2 I think for the first time. I haven't said a
3 word in this courtroom to complain about that.
4 We've just gone forward and done our best.

5 I do not accept the
6 characterization that was just made about
7 that, and I actually resent it being used as
8 a justification for anything here. I think we
9 should just move forward and finish the
10 testimony. But I couldn't leave that on the
11 record, Your Honor.

12 MR. SCHMIDT: We stand by our
13 position.

14 MR. CARROLL: I just wanted to
15 note it for the record, Your Honor.

16 JUDGE SIPPEL: I don't need to
17 hear anything more. The contract that you
18 were talking about, Mr. Carroll, is what, is
19 this Exhibit No. 321?

20 MR. CARROLL: No, that was
21 produced a long time ago, Your Honor.

22 JUDGE SIPPEL: What is the new

1 one?

2 MR. CARROLL: The new one was one
3 we produced yesterday that came from this
4 year, just recently signed. There's a new
5 DIRECTV deal.

6 JUDGE SIPPEL: Do I have that, or
7 I don't have that yet.

8 MR. SCHMIDT: I think it's put
9 into evidence, Your Honor.

10 JUDGE SIPPEL: If it's not in
11 evidence I don't want it.

12 MR. SCHMIDT: And just so we're
13 clear, this is a recent agreement that starts
14 to come into effect in 2012.

15 JUDGE SIPPEL: 2012?

16 MR. SCHMIDT: 2011, I'm sorry.

17 JUDGE SIPPEL: I might still be
18 here in 2011.

19 All right, anything more?

20 MR. BURKE: I think if you give
21 me a moment I'll just quickly review my notes.
22 I'm very close, Your Honor.

1 JUDGE SIPPEL: Let me ask a
2 question while you are doing the notes. I
3 want to be sure I'm clear. Now is it possible
4 let's say that this case gets decided down the
5 road, and it turns out that the - that Comcast
6 is directed by whatever authority that it has
7 to be - Comcast is directed to put the NFL
8 programming on D2 - I'm sorry, on expanded
9 basic. Let's say that is the relief that
10 ultimately is granted.

11 And what is down there in addition
12 to NFL is going to be Versus and Golf, and god
13 knows what else.

14 THE WITNESS: It's the top of my
15 figure when ESPN was up there -

16 JUDGE SIPPEL: No, no, I'm not
17 talking about ESPN - oh yes it is, I'm sorry,
18 you are right. Is there a number on that
19 exhibit, just out of curiosity? I should go
20 back and look at it.

21 MR. SCHMIDT: Is it 190?

22 JUDGE SIPPEL: We don't lose

1 them.

2 THE WITNESS: I'm sorry.

3 JUDGE SIPPEL: My question is
4 this, what is to prevent Comcast from moving
5 everything out of - just pull everything out
6 of basic, and say putting it up to a premium
7 level including its own stuff?

8 THE WITNESS: Nothing.

9 JUDGE SIPPEL: Then everybody
10 goes up together, and nobody has a complaint,
11 at least under the FCC statute.

12 THE WITNESS: So if Comcast were
13 to take its Golf and Versus, move them to the
14 premium tier right now, as an economist - I'm
15 not a lawyer - I don't think there would be a
16 basis for bringing a case because there would
17 be equal treatment.

18 JUDGE SIPPEL: Okay. I thought
19 that's what the discussion was here. I mean
20 it seems to me that it is only the so-called
21 differential -

22 THE WITNESS: It's the asymmetric

1 treatment that cannot persist according to -

2 JUDGE SIPPEL: Which is tied in

3 with price negotiation.

4 THE WITNESS: Okay, well -

5 JUDGE SIPPEL: You don't know

6 that? Economically you don't know that. What

7 is it?

8 THE WITNESS: Like I said, I

9 don't think they can cite to the price in what

10 I call the phase one. When we are trying to

11 make a determination of discrimination on the

12 basis of affiliation and impairment of a

13 rival, we don't look to price in that phase

14 one; we look to price in phase two. I don't

15 think that the price has an efficiency

16 justification for not caring, because as I

17 said any vertically integrated can cite a high

18 price as evidence - as a justification for why

19 they are not carrying, as part of a

20 discriminatory anticompetitive strategy.

21 JUDGE SIPPEL: You say that -

22 well, if the price that is being - you say

1 it's a supercompetitive price, it's a price,
2 it's a monopoly price? Can you define
3 monopoly price? Is there a way of figuring
4 that out as an economist? Is a monopoly price
5 a monopoly price? Or is a market price a
6 market price?

7 THE WITNESS: What I've offered
8 to try to help out -

9 JUDGE SIPPEL: Can you answer my
10 question? There is such a thing as a monopoly
11 price, isn't there?

12 THE WITNESS: I'm reluctant to
13 call it a monopoly price. The question in my
14 mind is, is it too high? If it's too high why
15 are all these people carrying it? Why do they
16 get over 50 percent penetration among the top
17 MVPDs when you exclude Comcast? It just
18 doesn't make sense to me. If the price was
19 too high why would all these people be
20 carrying it? They must value having the NFL
21 programming on their network.

22 JUDGE SIPPEL: Well, they can

1 surcharge to make a profit. I'm assuming that
2 it's everything about a profit. You said that
3 yourself, that's where you start off; pricing
4 is profit.

5 THE WITNESS: You set price to
6 maximize profit, not to try to sell out your
7 inventory every MVPD entry.

8 JUDGE SIPPEL: All right. Well,
9 if you've got the only show in town, your
10 concern is not going to be selling it out;
11 your concern is going to be, how much can I
12 get for it?

13 THE WITNESS: The only twist is
14 not how much you can get for it, but what is
15 the profit maximizing price, which is going to
16 be a higher price than the price that sells it
17 out, always.

18 JUDGE SIPPEL: So you may not get
19 - you are willing to forego the sell out to
20 get your maximizer?

21 THE WITNESS: Correct. That's
22 why you see empty seats on an airplane. If

1 they wanted to sell out the airplane they'd
2 set the price at \$10 to New York. But there
3 are empty seats; they are trying to maximize
4 profits.

5 JUDGE SIPPEL: Or you just take a
6 couple of planes off your fleet. There are
7 various ways of skinning a cat as they say.

8 All right, I'm finished.

9 MR. BURKE: I just wanted to
10 follow up on one thing that Dr. Singer said.

11 BY MR. BURKE:

12 Q You said you don't think price is
13 relevant in the first stage of the analysis,
14 which is whether there is discrimination,
15 right?

16 A Correct.

17 Q I guess I'm just struggling with
18 this, Dr. Singer. I thought you said in your
19 deposition that you should take price into
20 account as part of that analysis. Are you
21 taking that back now?

22 JUDGE SIPPEL: We are still

1 getting Blackberry interference. Now please,
2 is somebody - everybody stop right now and
3 check your Blackberries.

4 THE WITNESS: I have one, but
5 it's off.

6 JUDGE SIPPEL: Okay. We're
7 almost finished.

8 MR. BURKE: This is my last few
9 questions.

10 BY MR. BURKE:

11 Q So you are saying that price
12 should have no bearing on determining whether
13 there is discrimination; is that your
14 testimony now?

15 A It's a crude form of it. But I
16 think if I could restate, and this is what I
17 said earlier, is that we are trying to
18 distinguish, right, between an anticompetitive
19 refusal to carry and a pro-competitive refusal
20 to carry. And the problem with the focus on
21 price is that that test doesn't work.

22 If it is not going to distinguish

1 between the case of the guy who has a
2 plausible basis and a guy who doesn't, if I'm
3 doing for anticompetitive reasons, I can
4 always claim that your price is too high,
5 until you put it to zero, or until you pay me
6 for it, I can always claim that it's too high.
7 Everyone else is paying [REDACTED] for it, but
8 I want you to pay [REDACTED]; it's too high.

9 Q But if that's a lie you could
10 cross-examine the people and get documents and
11 otherwise test whether that is true or not;
12 isn't that right?

13 A If what's a lie? I'm sorry.

14 Q If your pretextual refusal, if
15 it's not really because it's too high, that is
16 something you could test?

17 A As an economist I do not like the
18 notion of price coming in. To the extent that
19 it comes in, I've offered it in my market
20 penetration test. And I've found that over
21 half the MVPDs weighted on a subscriber basis
22 carry this stuff at these prices.

1 So to me that ends the debate. If
2 the price was too high, why in the world are
3 all these people carrying it?

4 Q So you have two sellers of crabs,
5 and one has - they are basically the same type
6 of crabs, and one is three times more
7 expensive than the other - you would say you
8 can't take into account in determining whether
9 I'm discriminating and picking the cheaper
10 crab seller or the more expensive crab seller.

11 And the more expensive crab seller
12 says, I'm being discriminated against. But
13 you say price has no relevance to that
14 decision, to my defense of him when I'm
15 saying, no, I'm not discriminating against
16 you.

17 A I don't know if it has relevance
18 in that case. What I'm saying is that you
19 can't find price in this application in what
20 I call phase one that we don't get to the
21 issue of price, what the right price is.

22 First of all we have to decide

1 whether or not you are discriminating on the
2 basis of affiliation, and doing so in pairs of
3 rivals. Once we decide that then we flip over
4 to the price and we figure out what the right
5 price should be.

6 And if in your crab example if you
7 don't like the [REDACTED], there are prices all
8 over there. So Dish Network is paying [REDACTED], and
9 this guy is paying [REDACTED], and this guy is paying
10 [REDACTED]; pick the price you want to pay.

11 MR. BURKE: Thank you, Dr.
12 Singer.

13 THE WITNESS: Okay, thanks.

14 MR. SCHMIDT: Your Honor, we just
15 have a few short questions, and then we can
16 let Dr. Singer go for lunch.

17 REDIRECT EXAMINATION

18 BY MR. SCHMIDT:

19 Q Is it your experience, Dr. Singer,
20 that cable companies and other MVPDs pay the
21 most for sports content, pay the most in
22 licensing fees for sports channels?

1 A Relative to non-sports?

2 Q Yes, sir.

3 A Yes, I think sports is probably,
4 it's fair to say, is the most expensive
5 programming that is out there.

6 Q For example have you heard reports
7 in the media that ESPN charges somewhere in
8 the \$2 to \$3 to \$4 per sub range?

9 A Yeah, but of course I've got
10 access through Kagan to what they are actually
11 paying - being paid on average. But that
12 sounds - the idea that ESPN is getting between
13 \$2 and \$3 per subscriber per month, that
14 sounds fair.

15 Q Is it your experience that when
16 MVPDs choose to pay a price -

17 JUDGE SIPPEL: I'm sorry, I
18 didn't mean to interrupt.

19 MR. SCHMIDT: That's all right.

20 BY MR. SCHMIDT:

21 Q When MVPDs choose to pay a price,
22 like \$2 or \$3 per sub for ESPN that they

1 believe that is going to get them benefits in
2 terms of subscribers?

3 A Right. They are hoping that the -
4 or betting that the valuation of their
5 subscribers is in excess of \$2.

6 Q Is it unusual for carriers to
7 complain about price?

8 A No. I mean not just carriers; we
9 all complain about price all the time.

10 Q Did you nevertheless see a large
11 number of in-region rivals to Comcast, people
12 who actually compete with Comcast that carry
13 the NFL Network at prices higher according to
14 your chart than Comcast was being asked to pay
15 in this case?

16 A Right, every major in-region rival
17 that Comcast faces carries NFL Network at
18 these prices in very highly penetrated tiers.
19 So who does Comcast go after in cases where
20 Comcast faces - they go up against DIRECTV.
21 They carry it, and pay a market price and high
22 penetration. They go up against EchoStar;

1 they carry it, pay a market price, and a very
2 highly penetrated tier. They go up against
3 Verizon. They carry it on a very highly
4 penetrated tier with a surcharge. They go up
5 against AT&T. They could pay it, and they
6 carry it on a widely penetrated network.

7 After those guys you have a big
8 dropoff, then we fall to RCN in terms of how
9 big they are. But RCN carries it. This is
10 another one of those over filters.

11 JUDGE SIPPEL: Is it WOW?

12 THE WITNESS: WOW's different.
13 RCN and WOW are two different - I think there
14 was a little confusion earlier. So WOW
15 carries it, but not with the surcharge. A
16 very very small overbuild by the way. And
17 RCN, a larger overbuilder (phonetic), carries
18 it with the surcharge.

19 Now to me the reason why we should
20 focus on the carriage decisions of those in
21 region rivals is because the demand that - and
22 I'll run back through the list for you, Your

1 Honor - the demand that DIRECTV, EchoStar,
2 AT&T, Verizon and RCN faces in terms of the
3 preferences of the target audience, is the
4 same as the demand faced by Comcast, right.

5 Now why is that more important?

6 Well, pick a teeny tiny cable operator like
7 Bright House, who serves Tampa, Florida, and
8 Tampa only, maybe a few other regions. And
9 Comcast doesn't. It doesn't make economic
10 sense to look at the decision of tiny Bright
11 House in Tampa Bay as a proxy for the demand
12 that's faced by Comcast. We want to look to
13 the demand of Comcast's in-region rivals.

14 And without exception every major
15 in-region rival carries the NFL Network with
16 a surcharge at a highly penetrated tier.

17 In the decision of TCR versus Time
18 Warner, a case that I was personally involved
19 with on behalf of MASN, Time Warner said, Your
20 Honor, Judge Margolis, don't look at what all
21 my in-region rivals are doing. Look at what
22 these little small cable guys in North

1 Carolina are doing outside my footprint.
2 And Judge Margolis said, in his
3 ruling, that doesn't make any sense. We want
4 to look at the decisions of the in-region
5 rivals, DIRECTV, EchoStar, and that is what
6 decided the case.

7 BY MR. SCHMIDT:

8 Q Do you have what Comcast marked as
9 Exhibit No. 417 in front of you?

10 A I didn't get the markings.

11 Q Up in the corner.

12 A Oh, 417.

13 Q Do you remember being shown this
14 email?

15 A Yes. Yes.

16 Q This is an email regarding WOW.
17 You said WOW is a very small company.

18 A Right.

19 Q This is dated, the one I'm looking
20 at, although I guess they are all the same
21 date, is dated October 1, 2007; do you see
22 that?